Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JANETTE M. LOHMAN, et al.,

Petitioners,

v.

EVELYN SUSAN HAFLEY,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Deputy Attorney General for Litigation

JAMES R. McADAMS*
ALANA M. BARRAGÁN-SCOTT
Assistant Attorneys General

Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321

ATTORNEYS FOR PETITIONERS

Counsel of Record

55 pp

QUESTION PRESENTED

This case arises against the backdrop of an ever-increasing number of section 1983 cases brought against Missouri officials, particularly cabinet-level officers such as two petitioners here. Because the Eighth Circuit Court of Appeals has applied qualified immunity in a haphazard manner, these state officials are often denied the intended benefits of qualified immunity and required to engage in discovery and other pre-trial proceedings greatly disrupting the performance of their official duties. The question presented is:

Is a circuit court reviewing the denial of a motion to dismiss asserting an entitlement to qualified immunity required to employ a heightened pleading standard, i.e., a standard that requires the plaintiff to plead specific, nonconclusory facts that would allow the court to perform a fact-based qualified immunity analysis?

LIST OF PARTIES

The defendants-appellants in the proceedings below were the petitioners Janette Lohman, Director, Department of Revenue; James Callis, Deputy Director; Dean Powell, formerly, Assistant Administrator, Field Services Bureau; Richard Lamb, Administrator, Field Services Bureau; Raymond Hune, Director, Division of Motor Vehicles; William Siedhoff, formerly, Director, Division of Motor Vehicle and Driver's Licensing; Mary Ann Reuter, formerly, Field Services Bureau, Manager; Lynn Bexten, Personnel Officer; Zoe Lyle, formerly, Deputy Division Director, Motor Vehicle and Driver's Licensing; Ellie James, formerly, Administrator, Field Services Bureau; and William H. Melcher, formerly, Deputy Director and Acting Director. Respondent Evelyn Susan Hafley, an administrative assistant within the Field Services Bureau of the Missouri Department of Revenue, was the plaintiff-appellant below.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

A. There is a conflict in the circuits concerning the existence of a heightened pleading standard in qualified immunity cases, an important federal issue left open by this Court. . . 6

1. Importance of Qualified Immunity 6

2. Circuit Court Conflict Regarding Application of Heightened Pleading Standard Upon Appellate Review of Motion to Dismiss Asserting Qualified Immunity 7

3. Appellate Court Jurisdiction to Impose the Heightened Pleading Standard 13

B. Other circuit courts have reached inconsistent results as to the existence and possible application of a heightened pleading standard. 15

C. The conflicts and inconsistency concerning the existence and application of a heightened pleading standard warrant resolution by this court because qualified immunity is an important federal doctrine and the issue concerns a matter that is frequently before the lower courts. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

Anderson v. Creighton, 483 U.S. 635 (1987) 14

Babb v. Dorman, 33 F.3d 472 (5th Cir. 1994) 16

Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996) 17

Baxter by Baxter v. Vigo County School Corp.,
26 F.3d 728 (7th Cir. 1994) 15

Behrens v. Pelletier, ___ U.S. ___,
116 S.Ct. 834 (1996) 9, 13

Bivens v. Six Unknown Fed. Narcotics Agents,
403 U.S. 388 (1971) 12

Branch v. Tunnell, 14 F.3d 449 (9th Cir.)
cert. denied, ___ U.S. ___,
114 S.Ct. 2704 (1994) 12

Branch v. Tunnell, 937 F.2d 1382
(9th Cir. 1991) 11

Butz v. Economou, 438 U.S. 478 (1978) 21

Cameron v. Seitz, 38 F.3d 264 (6th Cir. 1994) 8

Crawford-El v. Britton, 93 F.3d 813
(D.C. Cir. 1996) 7, 12, 17, 18

Dominique v. Telb, 831 F.2d 673 (6th Cir. 1987) 8

Edgington v. Missouri Dep't of Corrections,
52 F.3d 777 (8th Cir. 1995) 13, 15

Gomez v. Toledo, 446 U.S. 635 (1980) 8

Guercio v. Brody, 911 F.2d 1179
(6th Cir. 1990) 8, 10, 21

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6

Henry v. Dep't of Navy, 902 F.2d 949
(Fed. Cir. 1990) 20

Johnson v. Jones, ___ U.S. ___,
115 S. Ct. 2151 (1995) 9, 13

Jordan by Jordan v. Jackson,
15 F.3d 333 (4th Cir. 1994) 15

Kimberlin v. Quinlan, 63 U.S.L.W. 3797
(U.S. May 9, 1995) (No. 93-2068) 19

*Leatherman v. Tarrant Co. Narcotics
Intelligence & Coordination Unit*,
507 U.S. 163 (1993) 7, 15, 16

Lindsey v. Shalmy, 29 F.3d 1382 (9th Cir. 1964) 18

Mitchell v. Forsyth, 472 U.S. 511 (1985) 8, 9, 13

Morin v. Caire, 77 F.3d 116 (5th Cir. 1996) 17

Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987) 14

Olandeinde v. City of Birmingham,
963 F.2d 1481 (11th Cir. 1992) 10, 11, 13

Pickering v. Board of Educ.,
391 U.S. 563 (1968) 8, 10, 21

Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) . . . 15-17

Siegert v. Gilley, 500 U.S. 226 (1991) 14, 19

Swift v. Chambers County Com'n, ___ U.S. ___,
115 S.Ct. 1203 (1995) 13

Veney v. Hogan, 70 F.3d 917 (6th Cir. 1996) 7-9, 21

Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989) . . 12

Wicks v. Mississippi State Employment Services,
41 F.3d 991 (5th Cir.), *cert. denied*,
___ U.S. ___, 115 S.Ct. 2555 (1995) 16

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

28 U.S.C. § 1343 (4) 1

42 U.S.C. § 1983 . . . . . 1, 2, 7, 11, 13

Fed.R.Civ.P. Rule 8(a) 8, 11, 13

Mo. Rev. Stat. § 32.057.1 (1994) 2, 20

Other Authorities:

Blum, *Heightened Pleading: Is There Life After Leatherman*, 44 Cath. U.L. Rev. 59 (Fall 1994) 15

Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (1995) 19

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Lohman, Callis, Powell, Lamb, Hune, Siedhoff, Reuter, Bexten, Lyle, James, and Melcher respectfully pray that the court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in *Evelyn Susan Hafley v. Janette M. Lohman, et al.*, No. 95-3405 (July 19, 1996).

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 90 F.3d 264 and reprinted in the Appendix ("App") at A-2. The district court's orders denying the motion to dismiss and the motion for reconsideration are both unreported and are reprinted in the Appendix at A-10 and A-9 respectively.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § § 1331, 1343 (4) and 42 U.S.C. § 1983, the respondent brought this suit in the United States District Court for the Western District of Missouri. On August 7, 1995, the district court denied petitioners' motion to dismiss. App. at A-10. Because the earlier order did not explicitly deny qualified immunity, petitioners filed a motion for reconsideration, which was denied on September 7, 1995. App. at A-9.

Petitioners appealed from the denial of their motion to dismiss, invoking the jurisdiction of the appellate court under

28 U.S.C. § 1291 and the collateral order doctrine. On July 19, 1996, the United States Court of Appeals for the Eighth Circuit affirmed the denial of petitioners' motion to dismiss asserting qualified immunity. App. at A-2. Petitioner's combined petition for rehearing and suggestions for rehearing en banc was denied on September 3, 1996. App. at A-1.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves parts of the First Amendment to the Constitution of the United States, 42 U.S.C. § 1983 and Mo. Rev. Stat. § 32.057.1 (1994). These provisions are reprinted in the Appendix beginning at A-20.

STATEMENT OF THE CASE

The respondent, a clerical employee amongst the two thousand employees of the Missouri Department of Revenue, has brought suit against eleven current and former Department officials generally alleging that they acted in concert to violate her right to freedom of expression in the work place. The petitioners, including the current and former cabinet-level directors of the Department and their immediate deputies, consist of two teams of supervisory employees from the current and former administrations of the Department. Seven of the eleven petitioners, including the current and former cabinet-level directors and their immediate deputies, are not linked in the complaint to any specific allegedly unconstitutional act. Rather, their names along with those of three other petitioners are entirely omitted from the substantive allegations of the complaint. The complaint is reprinted in its entirety in the Appendix at A-11 through A-19.

The only allegation as to petitioner James is that she has violated respondent's first amendment rights by instructing respondent to (1) "hide a file containing information about the Department['s]. . . fee office" from undisclosed individuals, and (2) to "say nothing about the file." Respondent allegedly declined, asserting that these instructions were unlawful. Respondent reported these instructions to petitioner Powell who allegedly violated respondent's constitutional rights by telling her to follow her supervisor's instructions and "stay out of it." App. at A-15. There is no allegation that at the time of these instructions petitioners were under any legal duty to disclose the existence or contents of the file. The remaining two petitioners, Lamb and Reuter, are only alleged to have violated respondent's rights by having been "advised" of information. App. at A-

15. It is alleged that the file was later seized as part of a criminal investigation and that petitioners, as a group, retaliated against respondent for her refusal to follow the allegedly "illegal" instructions. The complaint fails to link any petitioner with any specific act of retaliation and never discloses the basis for respondent's claim that James' instructions were illegal.

Given the sparseness of these allegations, petitioners filed a motion to dismiss asserting qualified immunity and requesting the district court to impose a heightened pleading standard on respondent's allegations. The district court initially denied the motion without mentioning qualified immunity. App. at A-10. Upon motion for reconsideration, the district court denied petitioner's claim of qualified immunity, finding "insufficient evidence . . . to weigh the applicability of defendants' assertion of qualified immunity," and noting that petitioners had been put on "notice" of respondent's complaint. App. at A-9.

On appeal the Eighth Circuit acknowledged that a heightened pleading standard is applicable when governmental officials assert qualified immunity (App. at A-5 through A-6) and that its review of the denial of a motion to dismiss asserting qualified immunity was *de novo*. App. at A-5. Nevertheless, the court refused to apply the heightened pleading standard applicable in the Eighth Circuit to its review of the complaint. App. at A-6. Rather, the court found that while it had jurisdiction to review the denial of qualified immunity, it lacked jurisdiction to review the factual sufficiency of respondent's allegations because the denial of the motion to dismiss asserting qualified immunity was not a final appealable order. App. at A-6. The petition for rehearing or rehearing en banc was denied. App. at A-1.

REASONS FOR GRANTING THE WRIT

This Court has indicated that qualified immunity protects important societal interests, preventing the diversion of officials and resources from the public's business and assuring that qualified individuals will neither be deterred from government service nor deterred from doing their duty during their tenure. *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982). The petition in this case should be granted because the decision of the Eighth Circuit, failing to effectuate qualified immunity, conflicts with the decisions of the Sixth, Ninth and Eleventh Circuits and is inconsistent with the holdings of this Court and additional circuit courts. In fact, the opinions of the circuit courts concerning the applicability of a heightened pleading standard are entirely inconsistent causing great confusion for governmental officials and the district courts. The district and circuit courts of this nation are regularly called upon to apply the doctrine of qualified immunity to prevent specious claims against government officials from interrupting important government operations. They do so in the absence of clear standards, producing inconsistent applications of qualified immunity and, thereby, further increasing the amount of § 1983 litigation.

As it now stands a cabinet officer subject to suit in the Eighth Circuit enjoys significantly less qualified immunity protection than a cabinet officer in the Sixth, Ninth and Eleventh Circuits. Conceivably, a cabinet officer performing an act in these circuits would be entitled to dismissal of a complaint while a cabinet officer in the Eighth Circuit performing the same act would be forced to engage in discovery and otherwise litigate the case. Federal officials would seem to be at particular risk. They could literally perform the same act in all four circuits and be entitled to dismissal in all but the Eighth Circuit. The result of a

qualified immunity analysis should not be dependent on the geographic location of the court performing it because the protections afforded by qualified immunity are equally compelling throughout the nation.

A. There is a conflict in the circuits concerning the existence of a heightened pleading standard in qualified immunity cases, an important federal issue left open by this Court.

1. Importance of Qualified Immunity. This Court has articulated the purpose of qualified immunity and its importance. As observed in *Harlow v. Fitzgerald,* 457 U.S. 800, 806-07 (1982), the protections of qualified immunity do not exist for the purpose of protecting the individuals that hold public office. Rather, qualified immunity protects society from certain costs it cannot realistically incur:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'

Id. at 814. These societal interests of the highest order are not vindicated by providing only cursory review to an assertion of qualified immunity. A cursory review is all a court can offer in the presence of inadequate factual allegations.

2. Circuit Court Conflict Regarding Application of Heightened Pleading Standard Upon Appellate Review of Motion to Dismiss Asserting Qualified Immunity. In *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166-67 (1993), this Court reserved for another day the propriety of applying a heightened pleading standard to allegations made against governmental officials who enjoy qualified immunity. The vast majority of the circuit courts impose some form of a heightened pleading standard[1], but the application of the doctrine to governmental officials asserting qualified immunity in a motion to dismiss varies widely. The Eighth Circuit refuses to apply the heightened pleading standard, which it imposes on its district courts, to its review of a motion to dismiss asserting qualified immunity despite the acknowledged *de novo* nature of that review. This conflicts with the decisions of at least three other circuits. In fact, the Sixth Circuit has been rather emphatic in its conclusion that the heightened pleading standard must be employed upon the review of the denial of a motion to dismiss asserting qualified immunity.

In *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1996), the Sixth Circuit reversed the denial of a motion to dismiss asserting qualified immunity. Like Hafley in the present case, Veney brought a § 1983 suit alleging that his superiors had retaliated against him in the context of his government employment for expressions protected by the First Amendment, including the filing of employee grievances and the reporting of misdeeds done by others. There is more factual specificity in Veney's claims than in Hafley's. The district court denied the motion to dismiss, like the district court here, finding that the notice pleading standards of

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[1] The cases are collected in *Crawford-El v. Britton*, 93 F.3d 813, 851 n.7 (D.C. Cir. 1996) (en banc), Edwards, J., concurring in judgment.

Fed.R.Civ.P. 8(a) sufficed despite the assertion of qualified immunity.

The Sixth Circuit disagreed, reiterated its historical views[2] and reversed the denial of the motion to dismiss. In criticism equally applicable to Hafley's complaint, the Sixth Circuit described the pleading as one that failed to "indicate the precise content and form of the complaints....., the context in which they were made, and when and to whom they were made.... [T]he complaint does not allege wrongdoing by any particular defendant." *Veney*, 70 F.3d at 922. The court indicated that a plaintiff pleading his complaint in such a "notice" format is required to respond to the defense of qualified immunity asserted through a motion to dismiss. *Id.* If the plaintiff's original complaint is deficient "he must amend his complaint to include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity." *Id.*[3] The Sixth Circuit

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[2] The Sixth Circuit had clearly forecast its view on the sufficiency of pleading necessary to overcome a defense of qualified immunity. *See Guercio v. Brody*, 911 F.2d 1179, 1187-89 (6th Cir. 1990) (applying *Pickering v. Board of Ed.*, 391 U.S. 563 (1968) to the nonconclusory allegations in the complaint and reversing the denial of defendants' motion to dismiss asserting qualified immunity). *See also Cameron v. Seitz*, 38 F.3d 264, 273 n.2 (6th Cir. 1994) ("a civil rights plaintiff should include in his original complaint all factual allegations necessary to sustain a conclusion that the defendant violated clearly established law"; if he fails he can replead); *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (same).

[3] This conclusion is not inconsistent with this Court's holding in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), that a plaintiff is not under an obligation to anticipate the defense of qualified immunity and plead around it. Rather the Sixth Circuit's heightened pleading requirement is consistent with this Court's precedent. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[u]nless the plaintiff's allegations state a claim of

chastised the district court's decision to employ a "notice" pleading standard:

> [The] failure to impose such a burden [the heightened pleading standard] at the pleading stage would eviscerate the substantive rights afforded by the qualified immunity defense. The promise of an early exit from a lawsuit offered by qualified immunity is an empty promise if plaintiffs are routinely permitted to survive a motion to dismiss with mere "notice" pleading. *Id.*

Unfortunately, an empty promise is all the protection qualified immunity provides to governmental officials in the Eighth Circuit who present a claim of immunity in a motion to dismiss. Cabinet-level officers in Missouri, their immediate deputies and everyone between them in the chain of command, all the way to the clerical-employee plaintiff, are required by the Eighth Circuit's opinion to participate in this case and are thus denied a meaningful opportunity for an early exit from the lawsuit. The decision of the Eighth Circuit, both in reasoning and result, is directly contrary to that of the Sixth Circuit in *Veney* and it ignores this Court's recent admonition that qualified immunity "is meant to give government officials a right, not merely to 'avoid standing trial,' but also avoid the burdens of 'such pretrial matters as discovery.'" *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 839 (1996), *quoting Mitchell*, 472 U.S. at 526.

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violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal . . ."). See also *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 2156 (1995) ("the appealable issue is purely a legal one: whether the facts alleged . . . support a claim of violation of clearly established law"), quoting, *Mitchell*, 472 U.S. at 528 n.9.

The Eighth Circuit's decision is in direct conflict with the decisions of the Sixth Circuit. The Eighth Circuit refuses to impose a heightened pleading standard, requiring a plaintiff to plead specific, nonconclusory allegations of fact with which the defense of qualified immunity can be evaluated, while the Sixth Circuit imposes the standard. The Eighth Circuit permits a plaintiff to proceed against seven defendants despite the absence of specific allegations of unconstitutional conduct while the Sixth Circuit rejects such a complaint. The Eighth Circuit purports to perform a *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), balancing test employing the vague allegations in the complaint while the Sixth Circuit only places well-pleaded, nonconclusory allegations on the *Pickering* scale.[4] The decisions of the Eighth and the Sixth Circuits conflict in every significant aspect.

The Sixth Circuit does not stand alone in imposing a heightened pleading standard when reviewing the denial of a motion to dismiss asserting qualified immunity. In *Olandeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992), the Eleventh Circuit considered the denial of such a motion. In that case, police officers brought a claim against the mayor and other officials alleging that they had retaliated against the police officers for exercising their freedom of expression. The mayor moved to dismiss, asserting that the

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[4] In order to perform a *Pickering* balancing test in the context of a motion to dismiss asserting qualified immunity, the court must "place the totality of the well-pleaded, non-conclusory allegations of the complaint on the *Pickering* scale to balance a public employee's interest in commenting on matters of public concern against the employer's interest in promoting the efficiency of the public services it performs through its employees . . . . [The] court must dispose of the motion to dismiss . . . by determining whether [plaintiff's] rights under *Pickering* . . . were so clear at the time in question that reasonable minds could not differ on the constitutionality of [the employment action]." *Guercio*, 911 F.2d at 1183-84, internal citations and quotations omitted.

allegations in the complaint were inadequate to overcome his qualified immunity. The district court denied the motion.

On appeal the Eleventh Circuit reversed. It noted that to protect public officials from the burdens of litigation over specious claims, "we, and other circuits, have tightened the application of Rule 8 to § 1983 cases." *Olandeinde*, 963 F.2d at 1485. The court noted that in pleading a § 1983 case additional detail is necessary to enable the court to see if the allegedly violated right was clearly established when the official acted. *Id.* The complaint the Eleventh Circuit considered, similar to Hafley's complaint here (App. at A-16, ¶ 15), generally alleged that the mayor along with other defendants took actions to punish and harass the plaintiff and that they all conspired to violate plaintiffs' rights. *Id.* at 1487. Conducting its *de novo* review, the court criticized these allegations.

> In the light of the heightened specificity requirements for Rule 8 in section 1983 cases, we look for definiteness in the averment of wrongful acts. These vague allegations, which are supported by no specific factual allegations against the Mayor, constitute no basis for a section 1983 cause of action. *Id.*

Not only did the court criticize the insufficiency of the plaintiff's factual allegations, it also took the opportunity to criticize the district court for failing to impose the heightened pleading standard. "We . . . stress that this heightened Rule 8 requirement -- as the law of the circuit -- must be applied by the district courts; and we had anticipated that it would be vigorously applied by the district court in this case." *Id.* at 1485. *See also Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (adopting a "heightened pleading standard" and finding "in order to survive a motion to dismiss, plaintiffs

must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent") and *Branch v. Tunnell*, 14 F.3d 449, 450 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2704 (1994) (refusing to reconsider the application of the heightened pleading standard in light of *Leatherman*).

The Eighth Circuit's conclusion that a qualified immunity analysis can be performed in the absence of the heightened pleading standard is also contrary to an opinion from the District of Columbia Circuit.[5] In *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), that court imposed a heightened pleading standard, requiring nonconclusory allegations of fact "specific and concrete enough to enable defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Id.* at 1171. Upon application of the heightened pleading standard to a *Bivens*[6] age discrimination claim, the court found that the complaint was insufficiently plead despite the fact that it asserted a *prima facia* case. Therefore, the court affirmed the district court's grant of the motion to dismiss asserting qualified immunity.

As discussed above, many circuit courts have found that a circuit court, reviewing the denial of a motion to dismiss asserting qualified immunity, is required to apply a heightened pleading standard to its review of the complaint. The Eighth Circuit, despite the fact that it imposes the

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[5] The views of the District of Columbia Circuit concerning the heightened pleading standard now appear uncertain. *See* part B below, discussing the District of Columbia Circuit's recent decision in *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996).

[6] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

heightened pleading standard on its district courts,[7] refused to apply the standard to its *de novo* review of a motion to dismiss asserting qualified immunity. Only this Court can resolve these conflicts.

3. Appellate Court Jurisdiction to Impose the Heightened Pleading Standard. The Eighth Circuit held here that it lacked jurisdiction to enforce the heightened pleading standard upon its *de novo* review of a motion to dismiss asserting qualified immunity because the denial of a Rule 12(b)(6) motion to dismiss is not a final appealable order. App. at A-6. This Court has found that the denial of a motion to dismiss asserting qualified immunity is a final appealable order, *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 839 (1996), and that courts can review, on a qualified immunity appeal, "whether or not certain given facts show[] a violation of 'clearly established law.'" *Johnson*, 115 S.Ct. at 2155, citing *Mitchell*, 472 U.S. at 528.

The Eleventh Circuit, disagreeing with the Eighth Circuit, has found that it had jurisdiction to impose the heightened pleading standard as part of its review of a denial of a motion to dismiss asserting qualified immunity. The court found "[a]t this early stage in the proceedings, the Rule 12(b)(6) defense and the qualified immunity defense become *intertwined*" and then the court, "[g]uided by . . . the heightened specificity requirement of Rule 8 in section 1983 cases" proceeded to determine the adequacy of the plaintiff's allegations. *Olandeinde*, 963 F.2d at 1485, emphasis added. This Court appears to favor the "inextricably intertwined" test to identify those issues over which circuit courts enjoy jurisdiction when reviewing the denial of qualified immunity. *Swift v. Chambers County Com'n*, ___ U.S. ___, 115 S.Ct.

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[7] *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995).

1203, 1212 (1995).

The sufficiency of the facts contained in a complaint are inextricably intertwined with a ruling on a defendant's claim that a plaintiff has failed to state a claim as a result of qualified immunity. Such a conclusion is compelled because the qualified immunity analysis, to be performed at all, must evaluate specific facts to determine if reasonable officials would have known that their alleged conduct violated clearly established law. *Myers v. Morris,* 810 F.2d 1437, 1459, n. 16 (8th Cir. 1987). This is equally true when the qualified immunity analysis is performed at the motion to dismiss stage. "Upon assertion of a qualified immunity defense the plaintiff must put forward specific, non-conclusory factual allegations which establish malice, or face dismissal." *Siegert v. Gilley,* 500 U.S. 226, 236 (1991), Kennedy, J., concurring. *See also Anderson v. Creighton,* 483 U.S. 635, 640-41 (1987) (Court of Appeals' qualified immunity analysis was deficient because the court failed to consider the circumstances the government actor faced). The district court here specifically found that the allegations in the complaint were insufficient to determine whether petitioners were entitled to qualified immunity but failed to dismiss the complaint or require respondent to replead, finding that petitioners had been given "notice" of respondent's claim. App. at A-9. The Eighth Circuit also imposed only a notice pleading standard.

The Sixth, Ninth and Eleventh Circuit courts disagree with the conclusion of the Eighth Circuit that notice pleading is sufficient to withstand appellate review of the denial of a motion to dismiss asserting qualified immunity. None of these circuits has found an absence of jurisdiction to apply the heightened pleading standard when performing the qualified immunity review, and the Eleventh Circuit has specifically found to the contrary. The Eighth Circuit's conclusion, that it lacks jurisdiction to impose a heightened

pleading standard, is illogical in light of the circuit court's acknowledged obligation to conduct a *de novo* review of the motion to dismiss (App. at A-5) and its embrace of the heightened pleading standard. *Edgington*, 52 F.3d at 779.

B. Other circuit courts have reached inconsistent results as to the existence and possible application of a heightened pleading standard.

Other federal circuits have reached inconsistent results as to whether a heightened pleading standard exists and, if so, how and when to apply the standard.[8] For example, the Fourth Circuit interpreted this court's opinion in *Leatherman* "almost to suggest" that a heightened pleading standard was required. *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994). *See also Schultea v. Wood*, 47 F.3d 1427, 1435 (5th Cir. 1995) (en banc) (Jones, J., concurring) ("*Leatherman* more naturally implies that the Supreme Court might *require* the imposition of a heightened pleading standard in these cases - let alone *permit* one to be applied") (emphasis in original). Compare these conclusions with the conclusion of the Seventh Circuit: "As the Supreme Court recently made very clear [in *Leatherman*], there is no heightened pleading requirement for civil rights actions." *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 (7th Cir. 1994)[9].

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[8] *See* Blum, *Heightened Pleading: Is There Life After Leatherman*, 44 Cath. U.L. Rev. 59, 76-77 (Fall 1994), collecting cases at n.89.

[9] The Seventh Circuit did not explain how a qualified immunity analysis can be performed at the motion to dismiss stage in the absence of specific factual allegations, but did note that it is not compelled to accept "conclusory allegations concerning the legal effect of facts set out in the complaint." *Id.* at 730. A reader suspects that this rule will now

The existing inconsistencies are readily apparent when one reviews cases from the Fifth and District of Columbia Circuits. The Fifth Circuit has long been a leader in heightened pleading jurisprudence. Following this Court's decision in *Leatherman* one might have expected the Fifth Circuit to pull back from the application of the heightened pleading standard. At least initially it did not. *See Babb v. Dorman*, 33 F.3d 472, 475 n.5 (5th Cir. 1994) (noting, following *Leatherman*, that "[t]o survive a motion to dismiss in cases where the qualified immunity defense is raised, a plaintiff must state facts, which if proven, would defeat the defense"); *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 994 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2555 (1995) (same).

Then in *Schultea*, it appeared the court was trying to reformulate its heightened pleading precedents. The court raised, but refused to resolve, the question left open in *Leatherman* concerning the application of a heightened pleading requirement (47 F.3d at 1432) and conceded that "avoiding qualified immunity is [not] an element of a claim." *Id.* at 1433. Nevertheless, the court stood by its "insistence that complaints plead more than conclusions, and that a plaintiff can, at the pleading stage, be required to engage the affirmative defense of qualified immunity when invoked." *Id.* at 1430. The court suggested that district courts have little choice but to require a plaintiff to file a "reply tailored to an answer pleading the defense of qualified immunity." *Id.* at 1434. The court additionally said that, prior to discovery, the plaintiff must support his claim "with sufficient precision to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts." *Id.* Four judges concurred in *Schultea*, to "defen[d] the continued vitality of

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be cited with increased frequency when qualified immunity is asserted in a motion to dismiss.

[the heightened pleading standard]." *Id.*

The concurring judges apparently worried for little reason. Subsequently, two panels of the Fifth Circuit have embraced the heightened pleading standard. *See Baker v. Putnal,* 75 F.3d 190, 195 (5th Cir. 1996) (*Schultea* "does not establish any new law with respect to the application of the heightened pleading standard"); *Morin v. Caire,* 77 F.3d 116, 120 (5th Cir. 1996) (reversing the denial of a motion to dismiss asserting qualified immunity, "[p]ublic officials are entitled to qualified immunity . . . unless it is shown by specific allegations that the officials violated clearly established law"). Hence, the Fifth Circuit apparently agrees with the Sixth, Ninth and Eleventh Circuits that notice pleading is insufficient to withstand a motion to dismiss once a government official asserts the defense of qualified immunity.

The Fifth Circuit's gyrations are a waltz compared to the District of Columbia Circuit's recent attempt to resolve the continuing applicability of the heightened pleading standard. It recently produced a 41 page opinion, including four concurring opinions, which revoked the use of the heightened pleading standard label but may have changed little else. *Crawford-El v. Britton,* 93 F.3d 813 (D.C. Cir. 1996)

In *Crawford-El* the court initially revoked its "requirement that plaintiff allege 'direct' evidence of unconstitutional motive." *Id.* at 815. More importantly here, the court rejected altogether the notion that the heightened pleading standard has anything to do with pleading requirements; labeling "heightened pleading" a "misnomer."

Id. at 823.[10] Nevertheless, the court reaffirmed its rule requiring a plaintiff to plead "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Id.* at 825. This, of course, is the essence of the heightened pleading requirement, the pleading of specific facts allowing the court to evaluate a claim that the defendants did not violate clearly established law.

The apparent inconsistency of these two positions was continued in the concurring opinion of Judge Edwards who rejected the heightened pleading requirement (plaintiffs "are not obligated to meet any form of heightened pleading standard in their initial complaint" *Id.* at 847), but still required the court to determine, "once a defendant actually asserts the qualified immunity defense," whether plaintiff has a "sufficient factual basis to support allegations of unconstitutional animus and therefore overcome qualified immunity." *Id.* at 849. In short, it appears that the court rejected the "heightened pleading standard" in name only, as it still requires plaintiffs, in response to an assertion of qualified immunity, to plead facts or to have pled facts that are sufficient to enable the court to perform the fact-intensive qualified immunity analysis.

C. The conflicts and inconsistency concerning the existence and application of a heightened pleading standard warrant resolution by this court because qualified immunity is an important federal doctrine

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[10] *But see Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1964) (application of heightened pleading standard appropriate at pleading, not summary judgment, stage).

and the issue concerns a matter that is frequently before the lower courts.

The case law from around the country provides ample evidence that there is absolutely no consistency in the manner that the circuits apply a heightened pleading standard, if they find one to exist at all. Given the frequency of civil rights suits[11] and the importance of this immunity doctrine to government officials who are frequently named as defendants based on their status without regard to their conduct, this inconsistency must be resolved. This Court has twice granted certiorari to address essentially the question presented here, but resolved those cases on different grounds. See questions presented in *Siegert*, 500 U.S. at 237 and *Kimberlin v. Quinlan*, 63 U.S.L.W. 3797 (U.S. May 9, 1995) (No. 93-2068). The question still requires resolution and this case presents an ideal avenue. It is a factually uncomplicated case, involving allegations that are hardly novel, where entitlement to qualified immunity was asserted in the motion to dismiss. There are no factual disputes. More to the point, there are almost no facts at all.

The complaint here rests on vague and conclusory actions that are simply insufficient to permit a conclusion that petitioners violated clearly established law. Hafley has brought a claim against the cabinet-level director and former director of the Missouri Department of Revenue, their immediate deputies and three additional petitioners without alleging a single fact in support of her claim that these defendants retaliated against her for complaining about instructions she received from her immediate supervisor.

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[11] The Judicial Conference has noted that increasing numbers of civil rights cases, particularly those brought by *pro se* litigants, have burdened the federal courts. *See* Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, p. 63 (1995).

These petitioners are not mentioned by name in the complaint's sparse allegations. In light of the insufficiency of the facts pled, no reviewing court can reasonably evaluate the conduct of these petitioners and conclude that it violated clearly established law.

Petitioners James and Powell are alleged to have alternatively instructed respondent to hide a file and not speak of it or to have instructed respondent to avoid the matter and follow her supervisor's instructions. The inability to measure these allegations against clearly established law becomes apparent when one considers that there is no allegation that James was under any obligation to disclose the existence of the file and that certain information maintained by the Department of Revenue is considered confidential by law. Specifically, Mo. Rev. Stat. § 32.057.1 (1994), provides that any person wrongfully disclosing confidential Department of Revenue information is guilty of a class D felony. Respondent has not described the contents of the file. Surely James is permitted to protect confidential information from improper disclosure. Finally, the law does not clearly protect respondent's allegation of illegality made against her supervisor to other Department employees. *See Henry v. Dep't of Navy,* 902 F.2d 949, 953 (Fed. Cir. 1990) (no First Amendment violation occurred where an employee was discharged for refusal to perform legitimately assigned work and for making false and unfounded accusations against employer).

Petitioners Lamb and Reuter allegedly were advised of the supposedly illegal instructions of James and Powell, hardly a clearly established constitutional wrong, and to have engaged with all the other petitioners in a long list of retaliatory acts not specifically linked to any of them. As the district court here conceded, respondent's allegations are insufficient to weigh petitioners' entitlement to qualified

immunity. App. at A-9. This complaint is the kind of "inchoate, generalized form of pleading that fails to convey to the district court the information it needs to determine whether a defendant is entitled to qualified immunity." *Veney*, 70 F.3d at 922. Respondent failed to disclose the missing information at the pleading stage and has consistently refused to do so, despite a motion to dismiss pinpointing the deficiencies, a motion for reconsideration advising that petitioners were considering an appeal, and an appeal that petitioners offered in writing to dismiss if respondent would present an amended complaint. Hence, it appears likely that respondent is engaged in "artful pleading" of the type federal courts are supposed to guard against, *Butz v. Economou*, 438 U.S. 478, 507 (1978), for the very purpose of defeating petitioners' qualified immunity.

The allegations contained in respondent's complaint would not have survived petitioners' assertion of qualified immunity in the Sixth Circuit. *Veney*, 70 F.3d at 922, *Guercio*, 911 F.2d at 1187-89. As the Sixth Circuit recognizes, no true *Pickering* balancing test can be performed absent the type of specific factual allegations required in the Sixth Circuit. If qualified immunity is to serve its important federal objectives, its application cannot be determined by the current geographic lottery.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Deputy Attorney General for
Litigation

JAMES R. McADAMS
Counsel of Record
ALANA M. BARRAGÁN-SCOTT
Assistant Attorneys General

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Petitioners

TABLE OF CONTENTS

United States Court of Appeals for the Eighth Circuit Order dated September 3, 1996 ..... A-1

United States Court of Appeals for the Eighth Circuit Opinion dated July 19, 1996 ..... A-2

Court Order dated September 7, 1995 ..... A-9

Court Order dated August 7, 1995 ..... A-10

Complaint A-11

Constitutional and Statutory Provisions A-20

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3405WMJC

Evelyn Susan Hafley,	*	
	*	
Appellee,	*	Order Denying Petition for
	*	Rehearing and Suggestion
vs.	*	for Rehearing En Banc
	*	
Janette Lohman, etc., et al.,	*	
	*	
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 3, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-3405

Evelyn Susan Hafley,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Missouri.
Janette Lohman, Director,	*	
Department of Revenue,	*	
State of Missouri; James	*	
Callis, Director, Department of	*	
Revenue, State of Missouri,	*	
Dean Powell, Assistant	*	
Administrator, Field Services	*	
Bureau, Department of Revenue,	*	
State of Missouri; Rich Lamb,	*	
Administrator, Field Services	*	
Bureau, Department of Revenue,	*	
State of Missouri; Raymond	*	
Hune, Director, Division of	*	
Motor Vehicle, Department of	*	
Revenue, State of Missouri;	*	
William Siedhoff, formerly,	*	
Director, Division of Motor	*	
Vehicle and Driver's Licensing,	*	
Department of Revenue, State of	*	
Missouri State of Missouri;	*	
Mary Ann Reuter, formerly,	*	
Field Services, Manager,	*	
Department of Revenue, State of	*	
Missouri; Lynn Bexten,	*	

Personnel Officer, Department of Revenue, State of Missouri; Zoe Lyle, Deputy Division Director, Motor Vehicle and Driver's Licensing, Department of Revenue, State of Missouri; Ellie James, formerly, Administrator, Field Services Bureau, Department of Revenue, State of Missouri; William H. Melcher, formerly, Deputy Director and Acting Director, Department of Revenue, State of Missouri,

Appellants.

Submitted: April 12, 1996

Filed: July 19, 1996

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

The sole issue in this case is whether the eleven defendants, current or former employees of the state of Missouri, are entitled to qualified immunity. The District

Court[1] denied the defendants' motion to dismiss the complaint on the basis of qualified immunity, and we affirm.

Evelyn Susan Hafley is an administrative coordinator with the field services bureau of the Missouri Department of Revenue. In her complaint, Hafley alleges that defendant Eillie James instructed her "to hide a file containing information about the Department of Revenue's University City Fee Office" and "to say nothing about said file." Complaint at ¶ 9. Hafley alleges that she refused to do as instructed because she believed that hiding the file would have been illegal. She then reported the incident to defendant Dean Powell, who allegedly told her to follow Jame's instructions and "stay out of it." Complaint at ¶ 11. Hafley also alleges that she reported the instructions she had received from James and Powell to defendants Rich Lamb and Mary Ann Reuter. She alleges that the defendants thereafter retaliated against her in a variety of ways for her attempts to report the actions of James and Powell and for her refusal to hide the file, which later allegedly was seized in a criminal investigation of the University City fee office. She alleges that the defendants took these actions "to punish Plaintiff for refusing to commit an illegal act and exercising her First Amendment rights," specifically the "right to exercise freedom of speech." Complaint at ¶¶ 16-17. The defendants have not filed an answer to the complaint. Instead, the defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

The District Court denied the motion to dismiss and the subsequent motion to reconsider "because there is insufficient evidence for the Court to weigh the applicability of defendants' assertion of qualified immunity . . . . Plaintiff

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[1] The Honorable Fernando J. Gaitan Jr., United States District Judge for the Western District of Missouri.

is required to put defendants on notice by the filing of her complaint. This she has done." Hafley v. Lohman, No. 95-4078-CV-C-2, order at 1 (W.D. Mo. Sept. 7, 1995) (denying motion to reconsider order denying motion to dismiss) (citations omitted).

"The denial of a defendant's motion to dismiss on the grounds of qualified immunity, although interlocutory in nature, is a final appealable order within the meaning of 28 U.S.C. § 1291." Weaver v. Clarke, 45 F.3d 1253, 1255 (8th Cir. 1995). We review de novo a district court's order denying a motion to dismiss, viewing the allegations in the complaint in the light most favorable to the plaintiff. Id. We note that "qualified immunity is an affirmative defense," and "it will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint." Id. The defendants in this case are entitled to qualified immunity unless Hafley has alleged the violation of a constitutional right that was clearly established at the time of the alleged violation. Id. Like the District Court, we must accept the allegations of the complaint as true when considering a Rule 12(b)(6) motion to dismiss. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "[D]ismissal is inappropriate 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" McCormack v. Citibank, N.A., 979 F.2d 643, 646 (8th Cir. 1992) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The defendants first contend that Hafley's complaint does not meet the heightened pleading standard that this Court has applied to "[c]omplaints seeking damages against government officials," Edgington v. Missouri Dep't of Corrections, 52 F.3d 777, 779 (8th Cir. 1995). They also contend that the Complaint fails to set forth specific acts committed by defendants Lohman, Callis, Hune, Siedhoff,

Bexten, Lyle, and Melcher. Those issues, however, are not properly before us. While an interlocutory order that decides the issue of qualified immunity may be final and appealable under § 1291, a denial of a motion to dismiss for failure to state a claim is not a final appealable order. See United States v. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275-76 (1988) (noting that denial of motion to dismiss is not appealable unless it fits within "a 'small class' of decisions that are appealable . . . even though they do not terminate the underlying litigations"). Thus we lack jurisdiction to consider the defendants' arguments regarding the sufficiency of the allegations in the complaint.

The defendants also contend that Hafley's complaint fails to allege that the defendants violated a constitutional right that was clearly established at the time of the alleged violation, thus showing that the defendants are entitled to qualified immunity on the face of the complaint. We disagree. We reiterate that we must accept the allegations in the complaint as true and construe all reasonable inferences therefrom in favor of Hafley at this early stage in the litigation. See McCormack, 979 F.2d at 646. In essence, Hafley alleges that she has been retaliated against for speaking to her supervisors about a matter of public concern, specifically an attempt to hide government records from an impending criminal investigation of the handling of public funds by the Missouri Department of Revenue at its University City fee office. At the time, it was clearly established that such retaliation could have violated the First Amendment. See, e.g., Pickering v. Board of Educ., 391 U.S. 563, 574 (1968) ("statements by public officials on matters of public concern must be accorded First Amendment protection"); ("We generally have held that speech about the use of public funds touches upon a matter of public concern."), cert. denied, 116 S. Ct. 1565 (1996). In Dunn v. Carroll, 40 F.3d 287 (8th Cir. 1994), this Court stated that

> [a] disciplinary action against a public employee violates his First Amendment rights if: (1) the conduct for which he was punished can be "fairly characterized as constituting speech on a matter of public concern," Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983); and (2) the interest of the employee in commenting on the matter of public concern outweighs the public employer's interest in promoting its efficiency by prohibiting the conduct. Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Id. at 291. Whether the protected speech is actually communicated to the public is irrelevant. See Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 415-16 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."); Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 674 (8th Cir. 1986). The defendants' argument that the allegations in the complaint fail to state a claim under Pickering is specious. Under Pickering, courts must balance "the interest of the [public employee] as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Construing the allegations and all reasonable inferences therefrom in favor of Hafley, it is clear that her interest in exposing an attempt to obstruct a criminal investigation into the handling of public funds outweighs the state's interest in the efficiency of its public services. The Pickering balance

understandably favors the plaintiff when the test is based solely on the allegations in the complaint.

The defendants argue that the allegations in the complaint can be construed differently, that is, in a way such that Hafley's speech appears to be related only to internal department policies. Such an argument is irrelevant, as we must construe the complaint in the light most favorable to Hafley. The defendants also asserted at oral argument that the allegations are baseless. Hafley may indeed fail to prove her allegations at trial, but that is irrelevant to the consideration of the defendants' Rule 12(b) (6) motion to dismiss. Moreover, the defendants ultimately may establish that they are entitled to qualified immunity, but we agree with the District Court that they have not done so yet.

For the reasons stated, the order of the District Court denying the defendants' motion to dismiss on the basis of qualified immunity is affirmed.

A true copy.

Attest:

CLERK, U. S. DISTRICT COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Evelyn Susan Hafley,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 95-4078-CV-C-2
	)	
Janette M. Lohman, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants' motion to reconsider is denied. Defendants' motion to dismiss is denied because there is insufficient evidence for the Court to weigh the applicability of defendants' assertion of qualified immunity. Foulks v. Cole County, Mo., 991 F.2d 454, 456 (8th Cir. 1991). Plaintiff is required to put defendants on notice by the filing of her complaint. This she has done. The Court does not find that Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989) or the other cases cited by defendants require plaintiff to do any more than she has at this stage of the litigation.

Defendants are given seven days from the date of this order to respond to plaintiff's complaint.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: September 7, 1995
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Evelyn Susan Hafley,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 95-4078-CV-C-2
	)	
Janette M. Lohman, et al.,	)	
	)	
Defendants.	)	

ORDER

Defendants' motion to dismiss is hereby denied. The parties are to submit a joint proposed scheduling order on or before August 21, 1995.

Fernando J. Gaitan, Jr.
United States District Judge

Dated: August 7, 1995
Kansas City, Missouri

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

EVELYN SUSAN HAFLEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. _____
	)	
JANETTE M. LOHMAN, Director, Department of Revenue, State of Missouri,	)	JURY TRIAL DEMANDED
	)	
and,	)	
	)	
JAMES CALLIS, Deputy Director, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
DEAN POWELL, formerly, Assistant Administrator, Field Services Bureau, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
RICH LAMB, Administrator, Field Services Bureau, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
RAYMOND HUNE, Director, Division of Motor Vehicle, Department of Revenue, State of Missouri,	)	
	)	
and,	)	
	)	
WILLIAM SIEDHOFF, formerly,	)	

Director, Division of Motor Vehicle)
and Driver's Licensing,)
Department of Revenue,)
State of Missouri,)
)
and,)
)
MARY ANN REUTER, formerly, Field)
Services, Manager, Department of)
Revenue, State of Missouri,)
)
and,)
)
LYNN BEXTEN, Personnel Officer,)
Department of Revenue,)
State of Missouri,)
)
and,)
)
ZOE LYLE, formerly, Deputy Division)
Director Motor Vehicle and Driver's)
Licensing, Department of Revenue,)
State of Missouri,)
)
and,)
)
ELLIE JAMES, formerly Administrator)
Field Services Bureau, Department of)
Revenue, State of Missouri,)
)
and,)
)
WILLIAM H. MELCHER,)
formerly, Deputy Director and)
Acting Director, Department of)
Revenue, State of Missouri,)
)
Defendants.)
)
SERVE DEFENDANTS, LOHMAN,)
BEXTEN, CALLIS, POWELL, LAMB,)
HUNE, and REUTER AT:)
Missouri Department of Revenue)
301 W. High Street)

Jefferson City, Missouri 65101)
)
SERVE DEFENDANT JAMES AT:)
2553 Haber)
St. Louis, Missouri 63136)
)
SERVE DEFENDANT SIEDHOFF AT:)
202 St. Louis Avenue)
Fulton, Missouri 65251)
)
SERVE DEFENDANT LYLE AT:)
2037 Wendemere Court)
Jefferson City, Missouri 65101)
)
SERVE DEFENDANT MELCHER AT:)
2227 Melin Drive)
Jefferson City, Missouri 65101)

COMPLAINT

COMES NOW, Plaintiff, Evelyn Susan Hafley, by and through her undersigned counsel, and as and for her Complaint against Defendants, and each of them, states and alleges as follows:

PRELIMINARY STATEMENT

1. That Plaintiff, Evelyn Susan Hafley, brings this action, and demands trial by jury on all issues which may be submitted to a jury, under 42 U.S.C. Sec. 1983, and the First and Fourteenth Amendments to the United States Constitution, namely, the right to exercise freedom of speech guaranteed under the First Amendment, for legal, equitable and declaratory relief to redress the injuries done to her and the deprivation of rights, privileges and immunities as aforesaid.

JURISDICTION AND VENUE

2. That the jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1343 (4), 28 U.S.C. Sec. 1331, and 42 U.S.C. Sec. 1983.

3. That at all times relevant to this Complaint, Defendants, and each of them, acted under color and pretense of law, to wit: color of statutes, ordinances, regulations, customs, and usages of the State of Missouri and Department of Revenue.

4. That at all times relevant to this Complaint, Defendants engaged in the illegal conduct herein mentioned to the injury of Plaintiff, and deprived Plaintiff of her rights, privileges and immunities secured to her by the First and Fourteenth Amendments to the Constitution of the United States and the laws of the Unites States of America and the State of Missouri.

PARTIES

5. That Plaintiff is, and was at all times relevant and material to this action, a citizen of the United States of America and State of Missouri residing in the County of Cole, State of Missouri.

6. That Plaintiff is, and was at all times relevant and material to this action, employed by the State of Missouri as Administrative Coordinator, Field Services Bureau, Department of Revenue.

7. That at all times relevant and material to this action, the Department of Revenue was an Executive Department authorized and existing under the laws of the State of Missouri.

8. That at all times relevant and material herein, Defendants Callis, Powell, Lamb, Hune, Siedhoff, Reuter, Bexten, Lyle and James were subject to the supervision of and policies promulgated by, Defendants Melcher and Lohman in the Department of Revenue, State of Missouri; and, further, Defendant Melcher was subject to the supervision of, and policies promulgated by Defendant Lohman in the Department of Revenue, State of Missouri.

FACTS

9. That on or about March 2, 1993, Plaintiff was told by Defendant, Ellie James to hide a file containing information about the Department of Revenue's University City Fee Office, and further told by Defendant, James to say nothing about said file.

10. That thereafter Plaintiff advised Defendant, James that Plaintiff would not either hide said file or agree to say nothing about it as such acts were illegal; Plaintiff, further, asked said Defendant, James if legal counsel from the Department of Revenue, State of Missouri was to attend an investigatory interview with said Defendant, James.

11. That thereafter Plaintiff reported the actions and instructions of Defendant, James as aforesaid to Defendant, Powell who told Plaintiff to, "do as [Defendant,] James had told her to do with said file" and "stay out of it".

12. That thereafter, notwithstanding the instructions of Defendants, Powell and James as aforesaid, and for reason that said instruction, if performed by Plaintiff would have constituted illegal conduct, Plaintiff refused to hide said file, and Plaintiff advised Defendants Lamb and

Reuter of the illegal instructions of defendants James and Powell.

13. That in or about March of 1993, a criminal investigation was instituted regarding practices at the Department's University City Fee Office, and the said file Plaintiff was instructed to hide was seized; and, all file cabinets int he Field Services Bureau, Department of Revenue, State of Missouri were locked and taped shut.

14. That upon information and belief, in or about June of 1993 Defendant, James was terminated from employment with the Department of Revenue by Defendant, Lohman for Defendant, James' involvement with the Department's University City Fee Office.

15. That since March of 1993, when Plaintiff refused to commit the illegal act of hiding said file and reported the illegal instructions of Defendant, James as aforesaid, Defendants, and each of them, individually and in concert, have retaliated against Plaintiff because of her refusal to commit the illegal conduct and for her exercise of First Amendment rights, such retaliation including, but not being limited to, verbal harassment of Plaintiff at home while she was recovering from appendicitis, assigning Plaintiff menial tasks, not allowing Plaintiff to perform duties in her job description, denying Plaintiff promotional transfers, refusing to give Plaintiff timely performance appraisals as required, negatively evaluating Plaintiff's performance and issuing to her a warning letter without cause, denying Plaintiff education reimbursement, denying Plaintiff attendance at training seminars, and denying Plaintiff overtime compensation, same being for the purpose of forcing Plaintiff to resign and to constructively discharge Plaintiff.

16. That all of the acts by the Defendants, and each of them, were done to punish Plaintiff for refusing to commit an illegal act and exercising her First Amendment rights.

17. That the acts done by the Defendants, and each of them, violated Plaintiff's right to exercise freedom of speech as guaranteed her by the Constitution of the United States of America.

18. That the acts done by the Defendants, and each of them, were in excess of any authority to grant them by law, and were without justification and in excess of any authority granted them by law, and were without justification or excuse in law.

19. That Defendants, and each of them, acted in concert and without authorization of law, willfully, knowingly and purposely, with the specific intent of depriving Plaintiff of her First Amendment rights.

20. That the acts of the Defendants did, in fact, deny Plaintiff her First Amendment rights as those rights are secured to Plaintiff by the provisions of the due process clause of the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. Sec. 1983 and the statutes and laws of the State of Missouri.

21. That as a result of the acts of Defendants, and each of them, Plaintiff has incurred, and will continue to incur, medically significant emotional distress, humiliation, embarrassment and damage to her reputation, lost job advancement and opportunity for promotion, monetary losses, attorney's fees and costs in connection with this action.

22. That Plaintiff has no plain and adequate remedy at law.

WHEREFORE, Plaintiff, Evelyn Susan Hafley, prays this Court to enter judgment in her favor, awarding her just compensation for damages sustained as a result of lost job advancement and promotional opportunity, expunging Plaintiffs negative performance appraisals and warning letter, preliminary and permanent injunction staying Defendants from further acts of retaliation against Plaintiff and requiring that she be accorded fair and equal treatment, Plaintiff's compensatory and punitive damages and reasonable attorney's fees; taxing the costs of this action against Defendants and for such further and additional relief as this Court may deem just and proper under the circumstances.

FUENTES & VASQUEZ, P.C.

By: Lloyd J. Vasquez, Jr. (MBE #31336)
Three Flags Center
1354 South Fifth Street
St. Charles, Missouri 63301
(314) 947-4070 (Phone)
(314) 947-4152 (Fax)

AND

L.G. COPELAND LAW OFFICES

By: L.G. Copeland (MBE #34337)
810 East Walnut
Columbia, Missouri 65102
(314) 874-3100 (Phone)
(314) 874-3200 (Fax)
Attorneys for Plaintiff,
Evelyn Susan Hafley

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 32.057.

Confidentiality of tax returns and department records - exceptions - penalty for violation. - 1. Except as otherwise specifically provided by law, it shall be unlawful for the director of revenue, any officer, employee, agent or deputy or former director, officer, employee, agent or deputy of the department of revenue, any person engaged or retained by the department of revenue on an independent contract basis, any person to whom authorized or unauthorized disclosure is made by the department of revenue, or any person who lawfully or unlawfully inspects any report or return filed with the department of revenue or to whom a copy, an abstract or a portion of any report or return is furnished by the department of revenue to make known in any manner, to permit the inspection or use of or to divulge to anyone any information relative to any such report or return, any information obtained by an investigation conducted by the department in discharge of official duty, or any information received by the director in cooperation with the United States or other states in the enforcement of the revenue laws of this state. Such confidential information is limited to information received by the department in connection with the administration of the tax laws of this state.

Supreme Court, U.S.
FILED
JAN 2 1997
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No. 96-906

In The

Supreme Court of the United States

October Term, 1996

JANETTE M. LOHMAN, *et al.*,

Petitioners,

vs.

EVELYN SUSAN HAFLEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LLOYD J. VASQUEZ, JR.
Counsel of Record
FUENTES & VASQUEZ
Attorneys for Respondent
1034 South Brentwood Boulevard
Suite 1800
St. Louis, Missouri 63117
(314) 862-0200

70224 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTION PRESENTED

In accordance with the requirement of United States Supreme Court Rule 15.2, objection is made to the initial paragraph of the Question Presented By Petitioners as it is not a question presented, but, rather, conclusory and unsupported narrative.

Further objection is made to the second paragraph of the Question Presented By Petitioners in that it improperly attempts to bring before this Court matter which the United States Court of Appeals for Eighth Circuit properly found that it lacked jurisdiction to review on interlocutory appeal, specifically, factual issues related to the sufficiency of the pleadings which were found factually sufficient by the United States District Court for the Western District of Missouri, Central Division.

LIST OF PARTIES

Petitioners are Janette Lohman, Director, Department of Revenue; James Callis, Deputy Director; Dean Powell, formerly, Assistant Administrator, Field Services Bureau; Rich Lamb, Administrator, Field Services Bureau; Raymond Hume, Director, Division of Motor Vehicles; William Siedhoff, formerly, Director, Division of Motor Vehicle and Driver's Licensing; Mary Ann Reuter, formerly, Field Services Bureau, Manager; Lynn Bexten, Personnel Officer; Zoe Lyle, formerly, Deputy Division Director, Motor Vehicle and Driver's Licensing; Ellie James, formerly, Administrator, Field Services Bureau; and, William H. Melcher, formerly, Deputy Director and Acting Director. Respondent is Evelyn Susan Hafley, currently an untitled employee of the Department of Revenue; formerly, and at all times relevant and material, Administrative Coordinator of its Field Services Bureau.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional, Statutory Provisions and Rules Involved	2
Statement of the Case	2
A. Course of Proceedings and Disposition of the Case Below.	3
B. Correction of Misstatements in the Petition	4
Reasons for Denying the Writ	6
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	8

Contents

	Page
Connick v. Myers, 461 U.S. 138 (1983)	11
Edgington v. Missouri Dep't of Corrections, 52 F.3d 777 (8th Cir. 1995)	7
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	8
Johnson v. Jones, __ U.S. __, 115 S. Ct. 2151 (1995)	6, 9, 10
Kincade v. City of Blue Springs, 64 F.3d 389 (8th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1565 (1996)	11
Magnum Import Co. v. Coty, 262 U.S. 159 (1923)	7
Mitchell v. Forsyth, 472 U.S. 511 (1985)	6, 8, 9
Olandeinde v. City of Birmingham, 963 F.2d 1481 (11th Cir. 1992)	8
Pickering v. Board of Education, 391 U.S. 563 (1968)	11
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	7
Veney v. Hogan, 70 F.3d 917 (6th Cir. 1996)	8
Whitacre v. Davey, 890 F.2d 1168 (D.C. Cir. 1989)	8

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1343(4) 2

28 U.S.C. § 2101(c) 2

42 U.S.C. § 1983 2

Mo. Rev. Stat. § 32.057.1 (1994) 2, 5

United States Constitution Cited:

First Amendment 2, 4, 11

Rules Cited:

Federal Rule of Civil Procedure 12(b)(6) 2, 7

Supreme Court Rule 10 6

Supreme Court Rule 15.2 ..... i, 5

APPENDIX

Appendix A — Rule 12(b)(6) of the Federal Rules of Civil Procedure 1a

Respondent, Evelyn Susan Hafley, respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 90 F.3d 264, and is reproduced in Petitioners' Appendix (hereinafter, "Pet. App.") at pages A-2 through A-8. The order of the Court of Appeals for the Eighth Circuit denying the Petition for Rehearing and Suggestions for Rehearing En Banc was filed on September 3, 1996, and is reproduced in Pet. App. A-1. The order is unpublished. The order of the United States District Court for the Western District of Missouri, Central Division denying Petitioners' [defendants'] Motion to Dismiss was filed on August 7, 1995, and is reproduced at Pet. App. A-10. The order is unpublished. The order of the United States District Court for the Western District of Missouri, Central Division denying Petitioners' [defendants'] Motion to Reconsider was filed on September 7, 1995, and is reproduced at Pet. App. A-9. The order is unpublished.

STATEMENT OF JURISDICTION

As the United States Court of Appeals for the Eighth Circuit lacked jurisdiction on interlocutory appeal to review the factual issues related to the sufficiency of the pleadings decided by the United States District Court for the Western District of Missouri, Central Division, it is respectfully submitted that this Court lacks jurisdiction to consider those factual issues. Although not expressly set forth in the Question Presented By Petitioners, to the extent Petitioners may be implicitly seeking review with respect to the purely legal issue of whether the legal norms allegedly violated were clearly established law at the time, this Court, should it choose to do so, has jurisdiction to review the

order, dated September 3, 1996, of the United States Court of Appeals for the Eighth Circuit denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc by a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

The United States Court of Appeals for the Eighth Circuit had jurisdiction over the legal issue of whether Petitioners [defendants] were entitled to qualified immunity on the appeal from the order, dated September 7, 1995, of the United States District Court for the Western District of Missouri, Central Division denying Petitioners' Motion to Reconsider [the Motion to Dismiss of Petitioners/defendants] pursuant to 28 U.S.C. § 1291. The United States District Court for the Western District of Missouri, Central Division had jurisdiction of Respondent's [plaintiff's] claims of violation of her rights under the First Amendment to the Constitution of the United States pursuant to 28 U.S.C. §§ 1331 and 1343(4) and 42 U.S.C. § 1983.

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

Parts of the First Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and Mo. Rev. Stat. § 32.057.1 (1994), which are set forth in Pet. App. A-20, A-21 and A-22 respectively; and, Rule 12(b)(6) of the Federal Rules of Civil Procedure which is set forth in Respondent's Appendix A hereto (hereinafter "Resp. App.").

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari which, in the main, assails the opinion of the United States Court of Appeals for the Eighth Circuit in this case with unsupported conclusions and hypotheticals, and fails to

demonstrate any compelling reason for the granting of a writ in this case.

A. Course of Proceedings and Disposition of the Case Below

Respondent, Evelyn Susan Hafley (hereinafter, "Mrs. Hafley), an Administrative Coordinator of eighteen (18) years tenure with the Missouri Department of Revenue, filed her complaint in this matter in the United States District Court for the Western District of Missouri, Central Division. The complaint is reproduced at Pet. App. A-11 through A-19. As indicated in the opinion of the United States Court of Appeals for the Eighth Circuit, Mrs. Hafley's claims arose as a result of retaliation against her, "for speaking to her supervisors about a matter of public concern, specifically an attempt to hide government records from an impending criminal investigation of the handling of public funds by the Missouri Department of Revenue at its University City Fee Office." Pet. App. at A-6.

On or about March 2, 1993, Mrs. Hafley was instructed by Petitioner, Ellie James, to hide a file containing information respecting the Missouri Department of Revenue's University City Fee Office, and further instructed to say nothing about it. Mrs. Hafley advised Ms. James that she would do neither act as such acts, if committed, would be illegal as the file and its contents were the subject of an impending criminal investigation. Shortly thereafter, in March of 1993, the file was seized by members of a criminal investigative team.

Subsequent to refusing Ms. James' instructions to commit illegal acts, Mrs. Hafley reported Ms. James' instructions to Ms. James' superior, Petitioner, Dean Powell. However, Mr. Powell, rather than responding to Mrs. Hafley's reporting of such illegal conduct, instead told her to do as Ms. James had told her to do, and stay out of it. Following her meeting with Mr. Powell, Mrs.

Hafley once again reported the actions and inactions of Ms. James and Mr. Powell to Mr. Powell's superiors, Petitioners Rich Lamb and Mary Ann Reuter, who took no remedial action.

Ms. James' employment with the Missouri Department of Revenue was terminated in or about June of 1993. However, beginning in March of 1993, immediately following Mrs. Hafley's speech detailed above, each of the Petitioners instituted various actions against Mrs. Hafley to which she had never before been subjected to in her long tenure as an employee of the Missouri Department of Revenue. Mrs. Hafley pled and contends that those actions were taken against her in retaliation for her exercise of First Amendment rights secured to her by the Constitution of the United States.

As noted in the opinion of the United States Court of Appeals for the Eighth Circuit, none of the Petitioners filed an answer to the complaint, "[I]nstead, the defendants [Petitioners] moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)." Pet. App. at A-4. The United States District Court for the Western Division of Missouri, Central Division denied Petitioners' motion to dismiss on the basis of qualified immunity and also denied a subsequent motion to reconsider. Pet. App. at A-9 and A-10. The United States Court of Appeals for the Eighth Circuit, conducting de novo review, affirmed the District Court's denial of Petitioners' motions to dismiss and to reconsider, and subsequently denied Petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. at A-1 through A-8.

B. Correction of Misstatements in the Petition

The opinion of the United States Court of Appeals for the Eighth Circuit correctly sets forth the facts of this case. The opinion accurately describes the gravity of the retaliatory acts

directed toward Mrs. Hafley and her interest in commenting upon matters of public concern. In the interest of making this brief truly brief, Respondent respectfully directs the Court's attention to the opinion of the United States Court of Appeals for the Eighth Circuit. Pet. App. at A-2 through A-8.

However, in accordance with the requirements of United States Supreme Court Rule 15.2, Respondent objects to, and brings the following misstatements of facts contained in the petition to, the Court's attention.

Objection is respectfully made to Petitioners' attempted characterization of Mrs. Hafley as a, "clerical employee" (Petition at 3). Mrs. Hafley was, at all times relevant and material, Administrative Coordinator, Field Services Bureau, Missouri Department of Revenue.

Ojection is respectfully made to Petitioners' attempted characterization of Mrs. Hafley's actions as a refusal to perform legitimately assigned work by their reference to the Revised Statutes of Missouri, § 32.057.1 (1994) (Petitition at 20). Mrs. Hafley refused to hide a file which was the subject of an impending criminal investigation.

Objection is respectfully made to Petitioners' attempted characterization that Mrs. Hafley made no substantive allegations as to multiple Petitioners (Petition at 3). As was noted by the United States Court of Appeals for the Eighth Circuit, Mrs. Hafley alleged in her complaint that, ". . . the defendants [each Petitioner] thereafter retaliated against her in a variety of ways for her attempts to report the actions of James and Powell and for her refusal to hide the file, which later allegedly was seized in a criminal investigation of the University City fee office. She alleges that the defendants [Petitioners] took these actions 'to punish Plaintiff [Respondent] for refusing

to commit an illegal act and exercising her First Amendment rights', specifically the 'right to exercise freedom of speech.' " Pet. App. A-4.

REASONS FOR DENYING THE WRIT

United States Supreme Court Rule 10 provides in pertinent part that, "[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will be granted only for compelling reasons." In the Petition for Writ of Certiorari, Petitioners have completely failed to demonstrate how this Court's review will impact anyone other than the immediate parties to this litigation.

As discussed in more detail below, Petitioners erroneously conclude that there are "conflicts and inconsistency" among the federal circuits with respect to factual sufficiency of pleadings. Further, that factual matter was not properly before the United States Court of Appeals for the Eighth Circuit, and is not properly before this Court. *Johnson v. Jones*, __ U.S. __, 115 S. Ct. 2151 (1995); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Petitioners do not, and cannot, demonstrate that the decision of the United States Court of Appeals for the Eighth Circuit deviates, in any way, from the recent mandate respecting the single, legal issue that is appealable from a District Court as set forth by this Court in *Johnson v. Jones*, 115 S. Ct. at 2158 (refusing to extend interlocutory appeals in qualified immunity cases to matters of factual sufficiency). Thus, Petitioners proferred "conflicts and inconsistency" argument is irrelevant and misplaced as to this case in its present posture as well as erroneous.

In essence, Petitioners' argument reduces to their dissatisfaction with the the result of the qualified immunity analysis conducted by the United States Court of Appeals for the Eighth Circuit as they concede that the United States Court

of Appeals for the Eighth Circuit did conduct de novo review in concluding that Mrs. Hafley had stated a claim of violation of clearly established law. However, this Court does not sit for the benefit of particular litigants. *See, Rice v. Sioux City Cemetery*, 349 U.S. 70, 74-75 (1955); nor is jurisdiction in this Court properly exercisable merely to give the defeated party in the circuit court of appeals another hearing. *See, Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

In sum, there is nothing special or compelling about the decision of the United States Court of Appeals for the Eighth Circuit that would justify the consideration of this Court. Whether the Petitioners are dissatisfied with the result of the analysis conducted by the United States Court of Appeals for the Eighth Circuit (hereinafter, "Court of Appeals") and with the factual sufficiency ruling of the United States District Court for the Western District of Missouri, Central Division (hereinafter, "District Court") is legally inconsequential. Of consequence, and mandating denial of the requested Writ of Certiorari, is the fact that the Court of Appeals applied the correct legal standard in conducting its analysis.

As noted above, the District Court twice reviewed the factual sufficiency of Mrs. Hafley's complaint on Petitioners' motion to dismiss on the grounds of qualified immunity pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and motion to reconsider. Thereafter, rather than file an answer, Petitioners appealed.

On appeal, Petitioners challenged, *inter alia*, the factual sufficiency of Mrs. Hafley's complaint contending that it did not meet the Court of Appeals heightened pleading requirement as set forth in *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995), and further contending that the complaint failed to set forth specific acts committed by seven

(7) of the eleven (11) Petitioners. The Court of Appeals correctly found that it lacked jurisdiction to consider Petitioners' challenge to the factual sufficiency of Mrs. Hafley's allegations.

Although Petitioners attempt to invoke review by this Court by asserting that "conflicts and inconsistency" exist as a result of the Court of Appeal's decision, they fail to appreciate that there is absolutely no conflict between the decision of the Court of Appeals and this Court's mandate on interlocutory appellate jursidiction set forth in *Johnson v. Jones*, *supra*. The only *post circa* 1995 case cited by Petitioners on this point, *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1996), does not support their proposed expansion of appellate review on interlocutory appeal. However, assuming *arguendo* the existence of conflicts and/or inconsistency between the Sixth Circuit and this Court's decision in *Johnson v. Jones*, *supra* it is respectfully submitted that review by this Court would be appropriately directed to *Veney*'s progeny in the Sixth Circuit. Further, it is respectfully noted that the other two cases cited by Petitioners on this point, *Olandeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992) and *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), were decided without the benefit of this Court's guidance in *Johnson v. Jones, supra.*

It is well established that public officials are entitled to qualified immunity when their conduct does not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining the entitlement, the threshold immunity question centers on an objective standard "as measured by reference to clearly established law." *Id.* at 818. A district court's denial of an entitlement to qualified immunity is properly the subject of an interlocutory appeal. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

However, contrary to Petitioners' assertions herein, the

appellate court is not required to review the district court's ruling on the factual sufficiency of the pleadings. *Mitchell v. Forsyth*, 472 U.S. at 528 ("An appellate court reviewing the denial of a defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . .").

The appealable issue is a purely legal issue; it is not, as Petitioners contend, a factual one. *Id.* at 528 n. 9. Thus, the Court of Appeals declination of jurisdiction as to Petitioners' factual sufficiency claims was completely proper. Indeed, as this Court reiterated in its last term, such declination of jurisdiction was requisite. *Johnson v. Jones*, __ U.S. __, 115 S. Ct. at 2156. In *Johnson* this Court discussed in detail *Mitchell, supra* in holding that a district court's denial of a motion for summary judgment on the grounds of qualified immunity, being factual in nature, was not appealable:

> We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," *i.e.*, which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. *Id.* at 2156.

Petitioners also fail to address the draconian impact that their proposed level of appellate review on interlocutory appeal would have on the dockets of the circuit courts of appeals and district courts throughout the United States as well as this Court. Petitioners' proffered fact based level of scrutiny would permit

any defendant (and, for that matter, any plaintiff opting not to file an amended complaint) disappointed by a district court's ruling on the factual sufficiency of pleadings to immediately seek interlocutory appellate review. Carried to its logical consequence, Petitioners' suggested level of scrutiny would also permit any party disappointed by the decision of a court of appeals to thereafter petition this Court for a Writ of Certiorari.

Petitioners' position on this point is characterizable as a "two or three bite at the apple rule" which would effectively open "appellate floodgates" and totally eliminate the role of the district courts of the United States in considering and ruling on motions to dismiss as well as motions for summary judgment in favor of plaintiffs. However, Petitioners' position is not novel; it is precisely the abandonment of separability and "small step beyond *Mitchell*" which this Court rejected during its last term. *Johnson v. Jones, supra* at 2157 ("[T]o take what petitioners call a small step beyond *Mitchell,* Brief for Petitioners 18, would more than relax the separability requirement — it would in many cases simply abandon it.")

Petitioners, as noted above, may also be implicitly raising the issue that Mrs. Hafley has not claimed a violation of clearly established law at the time of the challenged action. It is respectfully submitted that Petitioners' argument on this point is, as was found by the Court of Appeals, specious. Pet. App. at A-7. The Court of Appeals conducted the proper analysis and balancing test; again, Petitioners' dissatisfaction with the results thereof is not a reason for the granting of their requested Writ of Certiorari.

As noted by the Court of Appeals, Mrs. Hafley, herself a public official, alleged retaliation against her, "for speaking to her supervisors about a matter of public concern, specifically

an attempt to hide government records from an impending criminal investigation of the handling of public funds by the Missouri Department of Revenue at its University City fee office". Pet. App at A-6. The Court of Appeals conducted the proper legal analysis reasoning that speech regarding the use of public funds touches upon a matter of public concern. *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1565 (1996). The Court of Appeals further correctly concluded that statements by public officials, such as Mrs. Hafley, on matters of public concern are entitled to First Amendment protection, and that it was clearly established at the time of her speech that retaliation against her could have violated the First Amendment under *Connick v. Myers*, 461 U.S. 138, 146 (1983) and *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

The Court of Appeals then conducted the appropriate balancing test as mandated by this Court. *Pickering, supra* at 568 (balancing, "the interest of the [public employee] as a citizen, in commenting on matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). Properly construing the allegations and all reasonable inferences therefrom in favor of Mrs. Hafley, the Court of Appeals reasoned that her interest in exposing an attempt to obstruct a criminal investigation into the handling of public funds outweighed the state's interest, noting that, "[T]he *Pickering* balance understandably favors the plaintiff when the test is based solely on the allegations in the complaint." Pet. App. at A-7–A-8.

CONCLUSION

This case is not one appropriate for review by this Court. It proposes an untenable standard of appellate review on interlocutory appeals that was expressly rejected by this Court during its last term, and, as such, does not present a contemporary issue of special importance. Further, the United States Court of Appeals for the Eighth Circuit correctly applied the law. Therefore, and for the foregoing, the Writ of Certiorari should be denied.

Respectfully submitted,

LLOYD J. VASQUEZ, JR.
Counsel of Record
FUENTES & VASQUEZ
Attorneys for Respondent
1034 South Brentwood Boulevard
Suite 1800
St. Louis, Missouri 63117
(314) 862-0200

APPENDIX A — RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 12

DEFENSES AND OBJECTIONS — HOW PRESENTED — BY PLEADING OR MOTION — MOTION FOR JUDGMENT ON THE PLEADINGS

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if ione is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *

Supreme Court, U.S.
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No. 96-906

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JANETTE M. LOHMAN, et al.,

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Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Deputy Attorney General for Litigation

JAMES R. McADAMS*
ALANA M. BARRAGÁN-SCOTT
Assistant Attorneys General

Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321

ATTORNEYS FOR PETITIONERS
Counsel of Record

TABLE OF AUTHORITIES

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ACLU Foundation of Southern California v. Barr, 952 F.2d 457 (D.C. Cir. 1991) 4

Behrens v. Pelletier, ____ U.S. ____, 116 S.Ct. 834 (1996) 6

Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979) 4

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6, 8

Johnson v. Jones, __ U.S. __, 115 S.Ct. 2151 (1995) . 1-3

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) . . . 2

Siegert v. Gilley, 500 U.S. 226 (1991) 2

Williams v. Alabama State University, No. 95-6432, 1997 WL 542 (11th Cir. Jan. 6, 1997) 3

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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1. Respondent incorrectly contends that the decision of the Eighth Circuit, that it lacked jurisdiction to impose the heightened pleading requirement, is mandated by *Johnson v. Jones*, __ U.S. __, 115 S.Ct. 2151 (1995). In fact, *Johnson* was not even cited by the Eighth Circuit in reaching its conclusion and is readily distinguishable from this case.

In *Johnson* this Court decided that circuit courts, reviewing the denial of summary judgment motions asserting qualified immunity, do not enjoy jurisdiction to review a "District Court's determination that the summary judgment record . . . raised a genuine issue of fact." 115 S.Ct. at 2156. This decision has no applicability to this case seeking review of the denial of a motion to dismiss.

In contrast, this case concerns only a legal question: Are courts required to impose a heightened pleading standard in suits brought against public officials or can they permit a case to be pled in a vague, notice format that prevents an effective qualified immunity analysis? The district court found the facts alleged insufficient to perform a qualified immunity analysis, but denied the motion to dismiss because it found that only notice pleading was required. Petitioners' Appendix (Pet. App.), A-9. The Eighth Circuit, by finding an absence of jurisdiction to reach that issue, announced a rule that not only affirms the district court's rejection of the heightened pleading standard in this case, but would also

preclude the appellate courts from reviewing such a holding in any case.

In order to preserve an essential part of an effective qualified immunity defense, it is important that this Court announce that no jurisdictional disability exists in this and similar cases. The issue raised here meets the three-part test, as set forth in *Johnson*, for appealable collateral orders. It (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Johnson*, 115 S.Ct. at 2155, *citing*, *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). The insufficiency of respondent's complaint with its attendant impact on the qualified immunity analysis must be addressed now or it will forever evade review. The district court denied the governmental defendants immunity from suit because it found an absence of sufficient facts to perform a qualified immunity analysis and refused to impose a heightened pleading standard. This is a final determination subject to *de novo* review by the appellate court using the same standard as the one that should have been employed by the district court. Imposition of a heightened pleading standard is not jurisdictionally barred.

Respondent attempts to salvage her jurisdictional argument by quoting from *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), and asserting that an appellate court reviewing the denial of qualified immunity need not "determine whether the plaintiff's allegations actually state a claim." Brief in Opposition (Brf. Opp.), p. 9. But *Mitchell* is not the last word from this Court on that issue. As observed in *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), "[a] necessary concomitant to a determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the

time the defendant acted is the determination of whether the plaintiff has asserted a constitutional right at all." At the motion to dismiss stage a qualified immunity analysis and a determination of whether a claim has been stated require the pleading of sufficient facts. And if a § 1983 plaintiff has failed to allege a violation of a constitutional right, then the plaintiff has necessarily failed to allege something more difficult to prove: a violation of a "clearly established" constitutional right. The appellate courts should not artificially avoid such issues and thereby subject the public to the burdens of non-meritorious litigation against government officials.

The Eleventh Circuit recently provided a good model in a *Pickering* balancing case. In *Williams v. Alabama State University*, No. 95-6432, 1997 WL 542 (11th Cir. Jan. 6, 1997), that court, in marked contrast to the Eighth Circuit, reversed a district court's denial of a motion to dismiss asserting qualified immunity. The appellate court found the greater specificity of the required amended complaint helpful in determining that the plaintiff had not asserted a violation of clearly established law and noted that "the employer is entitled to immunity except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Id.* at *6. Additionally, the court denied a motion to dismiss the appeal, finding that *Johnson* did not deny appellate court jurisdiction over the legal issue of the sufficiency of the plaintiff's pleadings; it was "part of the core qualified immunity analysis." *Id.* at n.4.

2. Given the dearth of facts contained in the complaint it is not surprising that respondent would belatedly attempt to add facts that do not appear in the pleading itself. While predictable, respondent's attempt is inappropriate.

Respondent asserts that she was ordered to hide "government records from an impending criminal investigation." Brf. Opp., p. 3. Tellingly, no citation to the complaint is given because no such allegation can be found in the complaint. *See* Pet. App., A-11 through A-19. Not only is there an absence of an allegation of an "impending" criminal investigation, the complaint fails to allege that either respondent or petitioner James was aware of such a non-existent investigation or that petitioner James ordered that the file be hidden "from" such an investigation. For all that is alleged in complaint, petitioner James could have been ordering the file hidden to secure it. A court cannot simply assume necessary but missing factual allegations. *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979). *See also ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 472 (D.C. Cir. 1991) ("A court must take care not to put words into counsel's mouth by reading into the complaint factual allegations not fairly comprehended within what is actually asserted").

Similarly, respondent alleges in her Brief in Opposition, but not her complaint, that petitioners Lamb and Reuter "took no remedial action" when presented with an allegation that petitioner James had issued illegal instructions and petitioner Powell had affirmed them. Brf. Opp., p. 4. If respondent had wished to argue that petitioners Lamb and Reuter had breached a constitutional duty to take remedial action when informed of the allegedly illegal and rebuffed instructions, the same should have been pled and then a search for closely analogous case law could have been conducted to determine whether that supposed failure violated clearly established law. However, respondent's omission of this allegation (until the filing of her Brief in Opposition) prevented such analysis.

Finally, respondent makes one additional allegation for the first time in her Brief in Opposition. Respondent alleges that "immediately following Mrs. Hafley's speech . . . each of petitioners instituted various [retaliatory] actions against Mrs. Hafley." Brf. Opp. p. 4, emphasis added. This allegation, found nowhere in the complaint, is demonstrably false. The complaint discloses that on or about March 2, 1993, respondent engaged in her speech. Pet. App., A-15, ¶ 9. Petitioners Lohman and Hune could not have immediately begun to retaliate against respondent for this speech as they were not employed by the Department until April 26, 1993 and September 1, 1993, respectively. Respondent should not be permitted to oppose certiorari by supplementing her complaint at this stage with additional allegations, particularly ones that are patently false.

3. Respondent essentially concedes that the decision of the Eighth Circuit is inconsistent with that of the Sixth Circuit but asserts that this case is not appropriate for review because a resolution of the conflict would not be of general benefit. Brf. Opp., p. 7. Common sense dictates to the contrary.

In addition to the obvious injustice of subjecting governmental defendants to suit in the Eighth Circuit while permitting their early exit in similar circumstances in other circuits that properly apply a heightened pleading standard, the appellate opinion provides a blueprint for § 1983 plaintiffs wishing to avoid an early dismissal on qualified immunity grounds: merely draft a complaint that is so vague the court cannot tell "who did what." Once the opportunity for early dismissal is lost, the pressure mounts to settle the case, avoiding the serious problems that occur when the time of government officials is diverted to litigation instead of the provision of substantive services. This is the very problem

this Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Respondent feigns concern that use of the heightened pleading standard would have a "draconian impact . . . on the dockets of the circuit . . . and district courts." Brf. Opp., p. 9. In reality, the opposite is true. Permitting vague complaints such as respondent's to proceed encourages the filing of an ever expanding number of equally vague § 1983 complaints. This is a result that the judiciary and the other branches of government rightly fear.

If the Eighth Circuit's principles are permitted to govern, a zealous advocate would be motivated to draft an intentionally vague complaint so that a court would make the necessary assumptions to avoid dismissal (e.g., the department head made certain outrageous statements that constituted "verbal harassment"), even if the advocate could not ethically have alleged the facts that the court would assume exist. The advocate's motivation is clear: by surviving the early motion to dismiss, the plaintiff's settlement leverage is considerably increased as the government begins to suffer harm from the diversion of resources from the business of the people to litigation.

These concerns are not hypothetical. States are often subjected to § 1983 complaints that name a host of state officials--including governors and department heads. The top officials almost always prevail, even when liability is found against a lower level state employee. But the Eighth Circuit opinion allows everyone to be lumped together under vague allegations. This tactic effectively defeats qualified immunity at the motion to dismiss stage, a right this Court affirmed just last term in *Behrens v. Pelletier*, ____ U.S. ____, 116 S.Ct. 834 (1996). Courts should not be permitted to make claim determinative and potentially false assumptions that

effectively circumvent a qualified immunity analysis. At a minium, a § 1983 complaint should plead enough information so that a court can determine, as to each defendant, whether there is a claim and whether qualified immunity bars the claim against that particular defendant.

This case shows how artful pleading that complies with only minimal "notice" requirements can subvert the qualified immunity doctrine. Respondent sued eleven state officials, including two persons who have headed a department critically important for any state (the Department of Revenue). The most specific allegation against the senior officials is as follows:

> [All eleven] Defendants, and each of them, individually and in concert, have retaliated against Plaintiff because of her refusal to commit the illegal conduct[.]

Pet. App. A-16, ¶ 15. Such an allegation says absolutely nothing about how the two department heads and other petitioners were involved in the activities in question.

The complaint goes on to allege several more allegedly wrongful acts, such as the issuance of negative evaluations, the assignment of menial tasks, and "verbal harassment" while respondent was at home. Pet. App., A-16. But respondent did not link any of these more specific allegations to any particular petitioner. Moreover, even these allegations are too vague to state a claim: there is no constitutional right to avoid menial tasks or to be free from negative evaluations or "verbal harassment" (whatever that may be).

In this case, as in most others, the heightened pleading standard can be easily and fairly applied. For instance, the

heightened pleading standard requires respondent to say who actually made the negative evaluations and what actions were taken by others to bring about such evaluations, if any. The same approach could be used for the assignment of menial tasks. The content of the alleged "verbal harassment" should be described and the person(s) who spoke the words should be identified. This approach would not only make clear which petitioners really belong in the case (if any), but would also allow an evaluation of the conduct that purportedly occurred (as opposed to the conduct the Eighth Circuit would assume occurred) to determine whether it violates the constitution.

The heightened pleading standard merely requires a plaintiff to state what the plaintiff will eventually have to reveal anyway: who did what to whom. This is not a novel concept. This Court recognized that claims against government officials have different consequences than those brought against private litigants. *Harlow*, 457 U.S. at 814. Only the heightened pleading standard can make qualified immunity meaningful at the motion to dismiss stage.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Deputy Attorney General for
Litigation

JAMES R. McADAMS
Counsel of Record
ALANA M. BARRAGÁN-SCOTT
Assistant Attorneys General

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Petitioners